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Highway Patrol and Officer Ramon Silva

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANDRA KIRKMAN AND
CARLOS ALANIZ,
INDIVIDUALLY AND AS
SUCCESSORS-IN-INTEREST TO
JOHN ALANIZ, DECEASED,

Plaintiff,

v.

STATE OF CALIFORNIA;
RAMON SILVA; AND DOES 1-10,
INCLUSIVE,

Defendant.

Case No.: 2:23-cv-07532-DMG-SSC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS STATE OF
CALIFORNIA BY AND THROUGH
CALIFORNIA HIGHWAY PATROL
AND OFFICER RAMON SILVA'S
MOTION IN LIMINE TO EXCLUDE
OPINIONS OF PLAINTIFFS'
POLICE PRACTICES EXPERT
SCOTT DEFOE**

[No. 3 of 4]

Courtroom: 8C
Judge: Hon. Dolly M. Gee

FPTC: March 25, 2025, 2:00 p.m.

Trial Date: April 15, 2025, 8:30 a.m.

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INTRODUCTION

This case arises out of the fatal shooting of John Alaniz by California Highway Patrol Officer Ramon Silva.

CHP Officers Jonathan Van Dragt and Ramon Silva responded to the I-105 freeway because John Alaniz was purposely trying to kill himself by jumping in front of cars. Upon contact with the officers, Alaniz ignored commands to remove his hands from his pocket until he pulled objects from his pocket and immediately charged directly at the officers with his hands together and outstretched in front of him in the classic “shooter’s stance.” Reasonably believing Alaniz had a gun and was going to shoot (as anyone would), Silva responded with objectively reasonable deadly force. Alaniz was shot three times and died. Right before Officer Silva fired his gun, Officer Van Dragt fired his taser at Alaniz. It is disputed whether there was an effective taser strike, which requires both taser barbs to imbed into Alaniz’s skin/body.

Defendants Silva and State of California move to exclude opinions of plaintiffs’ police practices expert Scott DeFoe. DeFoe’s Federal Rule of Civil Procedure 26 report is Exhibit 1 to the Notice of Lodgment of Exhibits (NOL). *See* Roistacher Declaration, ¶ 2. DeFoe did not issue a supplemental report and was not deposed. *Id.*

ARGUMENT

A. Defoe Must Be Limited To The Opinions Contained In His Report And Thus Cannot Offer Any Taser-Related Opinions Or Any Other Opinions Not Contained In His Report

“[A] party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” Fed. R. Civ. P. 26(a)(2)(A). “[T]his disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one

1 retained or specially employed to provide expert testimony in the case.” Fed. R.
2 Civ. P. 26(a)(2)(B). The report shall contain “a complete statement of all
3 opinions the witness will express and the basis and reasons for them.” Fed. R.
4 Civ. P. 26(a)(2)(B)(i).

5 Federal Rule of Civil Procedure 37(c) “‘gives teeth” to Rule 26's disclosure
6 requirements.” *Sankaranarayanan v. Sashidhar*, 2025 U.S. Dist. LEXIS 1082, at
7 *3 (W.D. Wash. Jan. 3, 2025) (quoting *Yeti by Molly, Ltd. v. Deckers Outdoor*
8 *Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)). It “provides that a party that fails to
9 provide information as required by Rule 26(a) may not use that information on a
10 motion, at a hearing, or at a trial, unless the failure was substantially justified or
11 harmless. Fed. R. Civ. P. 37(c)(1). The advisory committee's notes to the 1993
12 Amendments describe this as an ‘automatic sanction.’” *Ruiz v. Walmart Inc.*, 2021
13 U.S. Dist. LEXIS 49761, at *11 (C.D. Cal. Jan. 21, 2021).

14 Thus, “the purpose of Rule 26 is to provide notice to the opposing party so
15 attorneys may prepare intelligently for trial” and “experts will be precluded from
16 providing opinions that are not set forth in their reports.” *Moller v. Cty. of San*
17 *Bernardino*, 2024 U.S. Dist. LEXIS 232429, at *11 (C.D. Cal. Jan. 2, 2024); *see*
18 *also Giacometto Ranch Inc. v. Denbury Onshore LLC*, 2024 U.S. Dist. LEXIS
19 33596, at *9 (D. Mont. Feb. 27, 2024) (“‘[e]xperts may only testify in
20 accordance with their expert reports”).

21 On January 11, 2025, DeFoe issued his Rule 26 report. The report contained
22 10 opinions. *See* Exh. 1, pp. 7-25. Not one of those opinions dealt with the issue
23 of whether Officer Van Dragt managed an effective taser shot on Alaniz, which
24 requires two taser barbs to penetrate skin/body.

25 In his recitation of “facts,” DeFoe does say “[t]he autopsy report indicates
26 that the taser barbs did penetrate [the decedent].” Exh. 1, p. 7. What the autopsy

27 ///

1 report says is not an opinion.¹ DeFoe also misstates the autopsy report. This is
2 what it says:

3 A projectile consistent with an electronic control device bard is
4 recovered from the clothing... Possible puncture marks are
5 identified on the upper extremities, but in the setting of medical
6 intervention no definite evidence of the electronic control device
contacting the skin is evidence.

7 NOL, Exh. 2, Autopsy Report, p. 13. *See* Roistacher Declaration, ¶ 3.

8 On February 7, 2025, plaintiffs submitted in opposition to defendants'
9 summary judgment motion a declaration by DeFoe (signed the same day)
10 providing the following opinion:

11 The Taser deployed by Officer Jonathan Van Dragt was likely
12 effective in achieving neuro-muscular incapacitation, as evidenced by
13 the penetration of two Taser barbs into Mr. Alaniz. [¶] Officer Silva's
14 body-worn camera footage further supports the conclusion that the
15 taser likely successfully incapacitated Mr. Alaniz, reducing any
16 immediate threat he may have posed. The video depicts Mr. Alaniz's
17 reaction to the Taser just prior to Officer Silva firing his weapon.

18 Doc. 70-13 ¶¶ 10, 11.

19 This is no question this new substantive opinion was not contained within
20 DeFoe's Rule 26 report, and he did not do a supplemental report.² This Court must

21 ¹ What the autopsy report says is also hearsay that DeFoe cannot regurgitate to
22 the jury.

23 ² Even if DeFoe had done a supplemental report containing this opinion, it would
24 have been improper. *Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d 866, 880
25 (C.D. Cal. 2013) ("Supplementation means correcting inaccuracies, or filling the
26 interstices of an incomplete report based on information that was not available at
27 the time of the initial disclosure. The duty to supplement does not give license to
28 sandbag one's opponent with claims and issues which should have been included
in the expert witness' original report.") (simplified); *see also* *L.A. Int'l Corp. v.*
Prestige Brands Holdings, Inc., 2023 U.S. Dist. LEXIS 230550, at *26-27 (C.D.

1 preclude DeFoe from offering at trial the opinion set forth in his declaration, or
2 any taser-related opinion.

3 New opinions offered in a declaration or even at deposition not contained
4 within an expert's Rule 26 report are inadmissible. *Ruiz v. Walmart Inc.*, 2021
5 U.S. Dist. LEXIS 49761, at *12 (C.D. Cal. Jan. 21, 2021) (excluding new opinions
6 in a declaration that were not contained in Rule 26 report); *Burns v. Koudelka*
7 *Transp. LLC*, 2024 U.S. Dist. LEXIS 194685, at *12-13 (D. Idaho Oct. 24, 2024)
8 (same) *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010) (same);
9 *Pajas v. Cty. of Monterey*, 2019 U.S. Dist. LEXIS 6629, at *7-8 (N.D. Cal. Jan.
10 14, 2019) (excluding opinions offered in deposition not contained in Rule 26
11 report); *Chavez v. S.F. Bay Area Rapid Transit Dist.*, 2024 U.S. Dist. LEXIS
12 110220, at *7 (N.D. Cal. June 21, 2024) ("A party may not cure a failure to disclose
13 an expert opinion in a written report by supplementing the expert's disclosure with
14 later deposition testimony."); *Romero v. AG Merrick B. Garland*, 2024 U.S. Dist.
15 LEXIS 44685, at *41 (S.D. Cal. Mar. 13, 2024) (same); *Foshee v. Zuniga*, 2021
16 U.S. Dist. LEXIS 92474, at *25 (N.D. Cal. May 14, 2021) (same)

17 **B. All of DeFoe's Opinions Are Inadmissible**

18 *I. Standards*

19 "Rule 702 of the Federal Rules of Evidence tasks a district court judge
20 with 'ensuring that an expert's testimony both rests on a reliable foundation and
21 is relevant to the task at hand.'" *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017,
22 1023 (9th Cir. 2022) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S.
23 579, 597 (1993)). This gatekeeping obligation applies to all expert testimony.
24 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). "The party offering
25 _____
26 Cal. Nov. 14, 2023) ("Courts have rejected supplemental expert reports that
27 were significantly different from the expert's original report and effectively
28 altered the expert's theories, or attempted to deepen and strengthen the experts'
prior reports.").

1 expert testimony has the burden of establishing its admissibility.” *Bldg. Indus.*
2 *Ass'n v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1154 (9th Cir. 2012);
3 *see also Lopez v. Johnson & Johnson*, 654 F. Supp. 3d 997, 1005 (C.D. Cal.
4 2023) (“The party offering the expert bears the burden of establishing that Rule
5 702 is satisfied.”).

6 Expert testimony must ‘help the trier of fact to understand the evidence or
7 to determine a fact in issue.’ Fed. R. Evid. 702(a). Opinions that ‘merely tell the
8 jury what result to reach’ are inadmissible. Fed. R. Evid. 704 advisory
9 committee's note on proposed rules. Accordingly, “[e]xpert witnesses are
10 prohibited from drawing legal conclusions since this would interfere with the
11 province of the trier of fact or the Court.” *Shirar v. Guerrero*, 2017 U.S. Dist.
12 LEXIS 232684, at *17 (C.D. Cal. Aug. 2, 2017) (quoting *Gonzalez v. City of*
13 *Garden Grove*, 2006 U.S. Dist. LEXIS 97148, at *8); *accord Estate of Morad v.*
14 *City of Long Beach*, 2018 U.S. Dist. LEXIS 245246, at *11 (C.D. Cal. June 15,
15 2018); *see Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1060
16 (9th Cir. 2008) (“[E]vidence that merely tells the jury what result to reach is not
17 sufficiently helpful to the trier of fact to be admissible.”) (simplified); *Mukhtar v.*
18 *Cal. State Univ.*, 299 F.3d 1053, 1065 n.10 (9th Cir. 2002) (“[A]n expert witness
19 cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate
20 issue of law.”)

21 2. Analysis

22 Thus, “[p]olice practices experts may only testify as to whether an action
23 conformed with a reasonable standard of practice, not whether the particular
24 officer's action was reasonable under the specific circumstances he faced.”
25 *Shirar*, 2017 U.S. Dist. LEXIS 232684, at *17. District court decisions
26 throughout the Ninth Circuit are in accord. *A.B. v. Cty. of San Diego*, 2020 U.S.
27 Dist. LEXIS 136761, at *16 (S.D. Cal. July 31, 2020) (“An expert witness
28 therefore cannot offer testimony as to the reasonableness of an officer's actions

1 and whether his use of force was appropriate under the facts of the case.”);
2 *Schroeder v. Cty. of San Bernardino*, 2019 U.S. Dist. LEXIS 140301, at *5-6
3 (C.D. Cal. May 7, 2019) (“The Court shall not permit [the expert] to testify in the
4 form of legal conclusions, such as whether Defendants' force was excessive or
5 unreasonable, or whether Defendants' actions were justified under the Fourth
6 Amendment, as those conclusions are within the province of the jury.”);
7 *Valtierra v. City of L.A.*, 99 F. Supp. 3d 1190, 1198 (C.D. Cal. 2015) (“Whether
8 the officers' actions were ‘objectively reasonable’ in light of the facts and
9 circumstances confronting them is, however, a question for the jury or, if no
10 material facts are in dispute, for the Court.”); *Chien Van Bui v. City & Cty. of*
11 *S.F.*, 2018 U.S. Dist. LEXIS 33917, at *14 (N.D. Cal. Feb. 27, 2018) (“[A]n
12 expert may address hypothetical situations (such as what a police officer might
13 do in a given situation) but cannot testify as to ultimate legal issues (such as
14 whether a course of conduct is legally reasonable or unreasonable).”);
15 *Valiavicharska v. Celaya*, 2012 U.S. Dist. LEXIS 8191, at *9 (N.D. Cal. Jan. 24,
16 2012) (“In excessive force cases, an expert may not opine on whether the
17 ‘Defendants' use of force was reasonable under the circumstances’ as this ‘is just
18 such an opinion on an ultimate issue of law that risks usurping the jury's
19 province.’”) (quoting *Martinez v. Davis*, 2011 U.S. Dist. LEXIS 15406, at *8
20 (C.D. Cal. Feb. 4, 2011); *Jimenez v. Sambrano*, 2009 U.S. Dist. LEXIS 67060, at
21 *8-9 (S.D. Cal. July 31, 2009) (“whether Defendants’ use of force was
22 unreasonable or excessive is an ultimate issue of law in this case” and thus
23 “opinions in this regard are inadmissible”).

24 This Court should exclude the following opinions of DeFoe because they
25 all run afoul of the rules just laid out for police practices experts. The “opinions”
26 are nothing more to instructions to the jury on how to view the facts and how to
27 decide the issues in the case. To the extent other rules warrant exclusion, those
28 rules are noted where appropriate.

1 **Opinion No. 1:** “[A] reasonable police Officer would have initially
2 determined [the decedent] was suicidal, mentally ill, and or experience a mental
3 crisis. It is my opinion that ... Officer Silva failed to initially determine [the
4 decedent] was suicidal mentally ill, and or experience a mental crisis.”³ Exh. 1,
5 p. 7.

6 **Opinion No. 1(a):** “It is my opinion that ... Officer Silva failed to properly
7 recognize that [the decedent] was exhibiting “Suicide by Cop” ideation when
8 they contacted him,” Exh. 1, p. 8; *see Valiavicharska v. Celaya*, 2012 U.S. Dist.
9 LEXIS 8191, at *8-9 (N.D. Cal. Jan. 24, 2012) (“It is also inappropriate for an
10 expert to attempt to intuit a party's subjective knowledge or create a question of
11 fact as to what the party actually knew.”) (simplified); *accord, Godinez v.*
12 *Huerta*, 2018 U.S. Dist. LEXIS 73623, at *18 (S.D. Cal. May 1, 2018).

13 **Opinion No. 1 (b):** “[I]t is my opinion that ... Officer Silva failed to
14 comply with California Highway Manual, HPM 70.6 ...,” Exh. 1, p. 8. *See*
15 *Landeros v. Las Vegas Metro. Police Dep't*, 2018 U.S. Dist. LEXIS 233434, at
16 *8 (D. Nev. Sep. 18, 2018) (“The court is persuaded by defendants' argument
17 that the trier of fact does not need expert testimony to determine whether Officer
18 Parra violated the LVMPD internal policy.”); *Malone v. Potter*, 2009 U.S. Dist.
19 LEXIS 134861, at *11 (C.D. Cal. Feb. 25, 2009) (“The court concludes that
20 Ball's testimony regarding defendant's alleged failure to follow its employment
21 policies does not meet the requirements of Rule 702.”)

22 **Opinion No. 2:** “[A] reasonable Police Officer would have initially
23 determined [the decedent] was a Danger to Self and met the criteria for a 5150
24 Hold. It is my opinion ... Officer Silva failed to initially determine whether [the
25

26 ³ Many of DeFoe’s opinions are phrased this way. He starts by saying what the
27 “reasonable officer” would know or do and then says Officer Silva failed to
28 conform his conduct to the “reasonable officer.” This is no different than saying
Officer Silva acted unreasonably.

1 decedent] was a Danger to Self and met the criteria for a 5150 Hold.” Exh. 1, pp.
2 9-10.

3 **Opinion No. 3:** “[A] reasonable Police Officer would have established an
4 inner and outer perimeter around I-105 W/B, W/ of Garfield Avenue, Paramount
5 California to contain [the decedent]. ¶ It is my opinion ... “Defendants to
6 include ...Officer Silva failed to contain [the decedent] in the area of I-105 W/B,
7 W/ of Garfield Avenue, Paramount California to include shutting down the
8 freeway until he was safely in custody. Exh. 1, p. 11. The portion of Opinion
9 No. 3 referring to other “defendants” is additionally inadmissible given only
10 Officer Silva’s conduct is relevant in this case; there are no other individual
11 defendants and the State’s liability is solely vicarious for Silva’s conduct. Evid.
12 Code §§ 401, 402.

13 **Opinion No. 4:** “[A] reasonable Police Officer would have immediately
14 tactically retreated or moved to a position of cover, if possible, to properly and
15 safely manage this tactical incident. [¶] In addition, it is my opinion ... Officer
16 Silva should have tactically retreated or moved to a position of cover, if possible,
17 to properly and safely manage this tactical incident.” Exh. 1, pp. 12-13.

18 **Opinion No. 5:** “It is my opinion the Defendants to include, ... Officer
19 Silva failed to formulate a safe tactical plan.” Exh. 1, p. 16. The portion of
20 Opinion No. 5 referring to other “defendants” is additionally inadmissible given
21 only Officer Silva’s conduct is relevant in this case; there are no other individual
22 defendants and the State’s liability is solely vicarious for Silva’s conduct. Evid.
23 Code §§ 401, 402.

24 **Opinion No. 6:** “It is my opinion that a reasonable Police Officer ... would
25 have given a verbal warning to [the decedent] that he was going to fire his
26 service weapon It is my opinion Officer Silva did not give a verbal
27 warning to [the decedent] and give [him] opportunity to comply prior to firing
28 his [gun] Exh. 1, p. 18.

1 **Opinion No. 7:** “[A] reasonable policy officer acting consistent with
2 standard police practices would not have used lethal force in this situation. [¶] In
3 my opinion ... Officer Silva used unnecessary, unreasonable and inappropriate
4 force when he shot and killed [the decedent] as he was not an imminent threat of
5 serious/great bodily injury or death to the Officers or a citizen(s).” Exh. 1, p. 19.

6 **Opinion No. 7(a):** “[I]t is my opinion based on my review of the facts and
7 videos in this matter ... Officer Silva violated with [sic] failed to comply with
8 California Highway Manual, HPM 70.6, Revised December 2020,” Exh. 1, p. 20.
9 *See Landeros*, 2018 U.S. Dist. LEXIS 233434, at *8; *Malone*, 2009 U.S. Dist.
10 LEXIS 134861, at *11; see also *Jones v. City of Los Angeles*, No. 2:20-CV-
11 11147-FWS-SK, 2023 U.S. Dist. LEXIS 46869, at * 8 (C.D. Cal. Feb. 24, 2023)
12 (“[An expert’s] testimony regarding his mere observations drawn from the video
13 evidence would be unhelpful to the jury, because the jurors can watch the videos
14 for themselves and make their own factual determinations In that sense, [the
15 expert] is not permitted to testify by narrating and/or instructing the jury
16 regarding what actually took place, as a factual matter, during the incidents
17 captured in the videos he edited and reviewed.”).

18 **Opinion No. 8:** “It is my opinion Officer Silva’s use of lethal force
19 violated Peace Officer Standards and Training and caused the unnecessary death
20 of [the decedent]” Exh. 1, p. 24

21 **Opinion No. 9:** “It is my opinion Officer Silva’s tactical conduct and
22 decisions preceding the use of deadly for in this matter was inappropriate based
23 on the totality of the circumstances. It is my opinion there was a departure from
24 POST Standards.” Exh. 1, p. 25.

25 **Opinion No. 10:** “It is my opinion that the California Highway Patrol
26 should have determined through its review process that the use of lethal force by
27 ... Officer Silva was unreasonable, unnecessary and inappropriate,” Exh. 1, p. 25.
28 Opinion No. 10 is additionally inadmissible because it is irrelevant to any issue

1 in the case and would only confuse the jury and prejudice Officer Silva; no direct
2 federal or state claims are alleged against CHP and whatever determination CHP
3 made has no bearing on Officer Silva’s liability. Evid. Code §§ 401, 402, 403.
4 Further, the opinion contains no foundation basis. DeFoe does not even state
5 knowing what the CHP determined, if anything. *Johnson v. City of L.A.*, 2019
6 U.S. Dist. LEXIS 241011, at *6 (C.D. Cal. Jan. 31, 2019) (“expert opinions
7 must have a sufficient factual and foundational basis in order to be helpful”).

8 **Opinion No. 10(a):** “[I]t is further my opinion there was a failure by
9 the California Highway Patrol to properly train ... Officer Silva” Exh. 1,
10 Report, p. 25. This opinion is inadmissible as irrelevant for the same reason
11 Opinion 10 is inadmissible.

12 CONCLUSION

13 This Court should grant defendants’ motion in full. DeFoe cannot be
14 allowed to opinion on any taser-related issue. And, as currently framed, not one
15 of DeFoe’s 10 opinions contained in his Rule 26 report are admissible.

16
17 Dated: March 14, 2025

Dean Gazzo Roistacher LLP

18
19 By: /s/ Lee H. Roistacher

20 Lee H. Roistacher
21 Attorneys for Defendants
22 State of California by and through
23 California Highway Patrol and
Officer Ramon Silva

24 CERTIFICATION OF COMPLIANCE

25 The undersigned, counsel of record for Defendants State of California by
26 and through California Highway Patrol and Officer Ramon Silva, certify that this

27 ///

1 Motion in Limine to Exclude Opinions of Plaintiffs' Police Practices Expert Scott
2 Defoe [No. 3 of 4] contains 3,137 words, which:

3 X complies with the word limit of L.R. 11-6.1.

4 complies with the word limit set by court order dated [date].
5

6 Dated: March 14, 2025

/s/ Lee H. Roistacher

Lee H. Roistacher , declarant
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